No. 14788

United States
COURT OF APPEALS
for the Ninth Circuit

DOROTHY S. WALKER,

Appellant,

vs.

WEST COAST FAST FREIGHT, INC., a corporation, and M. L. BURR,

Appellees.

BRIEF OF APPELLANT

Appeal from the United States District Court for the District of Oregon.

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STEVENS-NESS LAW PUB. CO.

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STATEMENT OF PLEADINGS AND FACTS OF JURISDICTION

This is a cause on appeal from the United States District Court for the District of Oregon. It is an action in which plaintiff seeks to recover the sum of $75,000.00 (Tr. 6), general damages, and $936.13, special damages (Tr. 6), from defendants. Appellant recovered judgment

in the United States District Court for the District of Oregon against appellees for the sum of $1,500.00, together with costs and disbursements (Tr. 9), and appellant appeals from that judgment.

The appellant was a citizen of the State of Oregon (Tr. 3), and appellee, West Coast Fast Freight, Inc., was a citizen of the State of California, with office and principal place of business in Portland, Multnomah County, Oregon (Tr. 3), and appellee, M. L. Burr, was a citizen of the State of Washington (Tr. 4); the amount in controversy, exclusive of interest and costs, exceeds the sum of $3,000.00 (Tr. 4).

This action was removed to the United States District Court for the District of Oregon, pursuant to 28 U.S.C.A. Secs. 1332 and 1441 (Tr. 4).

This Court has appellate jurisdiction to review this case by virtue of 28 U.S.C.A. 1291.

The documents showing the existence of jurisdiction are the Pre-trial Order (Tr. 3), Judgment Order (Tr. 9), Notice of Appeal (Tr. 15), and Bond for Costs of Appeal (Tr. 16).

STATEMENT OF THE CASE

This cause arises out of an automobile accident in which appellant was injured on May 3, 1953, on Highway 99E, near Albany, Oregon (Tr. 4). Appellee, M. L. Burr, was employed by appellee, West Coast Fast Freight, Inc., at the time of the occurrence, as a truck-driver (Tr. 4).

Plaintiff contended that at said time and place, appellee, M. L. Burr, so negligently drove a motor truck owned by defendant corporation as to force appellant to drive her automobile off of said highway in order to avoid a head-on collision with the vehicle being driven by appellee, M. L. Burr, on the wrong (left) half of said highway (Tr. 5); that in driving her automobile off of said highway, appellant was seriously injured (Tr. 5), and brought action to recover $75,000.00, general damages, and $936.13, special damages (Tr. 6).

That prior to the trial of said case, appellant was examined by a doctor selected by appellee and X-rays were taken of appellant by said doctor (Tr. 141).

That subsequent to said injury appellant became pregnant with child (Tr. 68), the birth of which was untimely produced by stimulation necessitated by reason of the injuries received in said accident (Tr. 130).

That during plaintiff's opening statement the court, on its own volition, restricted plaintiff's description of her injuries, as well as the normal and natural effect thereof (Tr. 32), and during the course of said trial plaintiff was not permitted to testify to the natural effect of said injuries (Tr. 68), and was not permitted to prove, by expert medical testimony, the natural effect of said injuries (Tr. 130).

That the reason given for said restriction was that defendants had not been apprised of said claim and had no opportunity to anticipate it, and were therefore unable to properly defend said action (Tr. 130).

That during plaintiff's case in chief, defendants were permitted to call their own medical expert, who had examined plaintiff only for the purpose of qualifying himself (Tr. 141), and said expert was permitted, over the objection of plaintiff, to testify as to the medical history prepared by himself at the time of his examination of plaintiff (Tr. 142).

The court failed to include in its charge to the jury an instruction as to plaintiff's life expectancy under the Standard American Mortality Tables, though said instruction was requested in writing by plaintiff (Tr. 284).

The court, in its charge to the jury, unfavorably commented upon the evidence (Tr. 265, 269), without advising the jury that said instructions constituted comment, after first having advised the jury that it would tell the jury what portion of its instruction constituted comment (Tr. 257).

That the court commented upon the credibility of plaintiff's testimony, and by implication instructed the jury that her testimony was not worthy of belief, solely, on the basis that she had an interest possessed by no other witness (Tr. 269).

That plaintiff's special damages amounted to $936.13 (Tr. 266), that the jury awarded judgment only in the sum of $1500.00 (Tr. 9). That said sum was as a matter of law inadequate, considering the nature and extent of the injuries, the pain and suffering resulting therefrom, as well as the permanency of said injuries.

That after the entry of judgment in favor of plaintiff and against both defendants on February 28, 1955

(Tr. 9), plaintiff filed a motion for a new trial, based upon the above-mentioned facts, which motion was denied (Tr. 14).

Thereafter plaintiff brought this appeal from said judgment in her favor in the sum of $1500.00, entered herein on February 28, 1955.

SPECIFICATIONS OF ERROR

I.

The trial Court erred in advising counsel for the plaintiff during opening statement that said counsel's reference to pain and difficulties from pregnancy and childbirth of the plaintiff subsequent to the injuries complained of should not have been referred to and were not admissible upon trial, without objection made by counsel for defendants (Tr. 32), for the reason that evidence of said pain and difficulties from pregnancy and childbirth was admissible under the pre-trial order (Tr. 5), and the comments of the Court were prejudicial in that they extended beyond the scope of the issue raised by the Court (Tr. 32); they were directed at Counsel personally, thereby inferring to the jury that counsel was acting improperly, and no objection was made on behalf of appellees, giving rise to an issue calling for the Court's ruling (Tr. 32), all of which was prejudicial in that it caused the jury to be biased unfavorably against appellant.

II.

The trial Court erred in refusing to permit plaintiff to prove by expert medical testimony the effects of the

injuries to her lower back, known to medical science as lumbo-sacral sprain, and displacement of her coccyx (Tr. 130), upon the ground and for the reason that appellant was entitled to prove the natural effect and result of the injuries alleged in the pre-trial order (Tr. 5).

III.

The trial Court erred in sustaining objection to the following question on direct examination of plaintff:

> "Q. Did you have any difficulty during the pregnancy . . . ?" "Objection." "Objection sustained." (Tr. 68.)

And in refusing to permit plaintiff to testify as to the effects in the nature of pain and suffering and difficulties of pregnancy and childbirth arising from the injuries complained of, as appears in the following offer of proof (Tr. 253):

> "Q. Mrs. Walker, when did you give birth to the child, your last born child?
>
> A. October 19, 1954.
>
> Q. Was the child earlier than the nine-month period of gestation?
>
> A. Yes.
>
> Q. What period of gestation was there?
>
> A. About seven and one-half months.
>
> Q. Who was the doctor at that time?
>
> A. Dr. George Lage.
>
> Q. Is he an obstetrician?
>
> A. Yes.
>
> Q. Was there any inducement for earlier premature childbirth?
>
> A. Yes.
>
> Q. Did you have any difficulty with your back or right hip or coccyx during pregnancy?
>
> A. Definitely, yes.
>
> Q. Do you know the reason or relationship of

the pregnancy with your difficulty with your back and coccyx and right hip?

A. Yes.

Q. What is the relationship?

A. Well, as the baby got heavier and the pressure increased on the bone structure in that region, it became very painful or sore.

Q. Could you wear a back support for it?

A. I couldn't wear a back support because I could not have tightness over my tummy.

Q. Did any doctor prescribe a back support for you?

A. Dr. Abele told me to wear a tight girdle. That was before I was pregnant. I couldn't wear girdle because of the pregnancy." (Tr. 254.)

Upon the ground and for the reason the appellant was entitled to show the jury in what manner and to what extent the injuries described in the pre-trial order (Tr. 5), interfered with her normal physical functions and to show plaintiff's physical and mental pain and suffering.

IV.

The trial Court erred in failing to sustain plaintiff's objection to the question asked by defendants on direct examination of defendants' expert medical witness, Dr. Orville Noble Jones, as follows (Tr. 141):

"Q. Will you relate to the jury what this lady told with reference to how she got hurt?

A. Yes.

Mr. Peterson: I object to that, your Honor.

The Court: On what ground do you object?

Mr. Peterson: On the ground that it is not a history related to the witness as a treating doctor.

The Court: This is an adverse witness, Mr. Peterson. The objection is over-ruled." (Tr. 142.)

And in permitting said witness to relate in answer to said question a purported history of injury (Tr. 142),

upon the ground and for the reason that appellees' medical expert examined appellant only for the purpose of qualifying himself as a witness in this case and not for the purpose of treating appellant (Tr. 141), and that said purported history was adverse to plaintiff in that the witness testified that plaintiff had related that the car which she was driving "skidded and rolled down a sixty-foot embankment" (Tr. 142); that, "she carried out limited physical activity due to her tuberculosis" (Tr. 143); and, "that she admitted 'freely' a prior accident where she had a fractured rib, but no injuries to her pelvis, back and coccyx" (Tr. 144), said details being contrary to plaintiff's evidence.

V.

The trial Court erred in failing and refusing to give plaintiff's requested instruction No. 8, which written instruction is as follows (Tr. 284):

> "In this case, if you find that the plaintiff Dorothy S. Walker is entitled to a verdict at your hands, then it will be your duty to assess plaintiff's damages. You are instructed that the law aims at just, fair and reasonable compensation. In assessing damages for the plaintiff, you will take into consideration the nature and extent of plaintiff's injuries. You will also take into consideration all of the pain and suffering which plaintiff has endured, if any, as a result of injuries sustained by her. Such pain and suffering includes both physical and mental suffering. You will also take into consideration whether plaintiff will be caused to endure pain and suffering in the future. You will also take into consideration whether plaintiff's injuries are permanent, then you will take into consideration plaintiff's life expectancy.

"You are instructed that under the Standard American Mortality Tables, a person of the age of thirty-five years has a life expectancy of 33.44 years. However, plaintiff's life expectancy is a question of fact for you to determine, taking into consideration plaintiff's age, sex, health, habits and nature of her occupation, whether hazardous or not.

"You will take into consideration whether plaintiff's injuries, if any, permanently impaired her ability to work and perform physical activities.

"You will also take into consideration the amount of the reasonable value, as shown by the evidence in this case, of all doctor, hospital, ambulance and medical expenses incurred by the plaintiff in the treatment of injuries sustained by her, if any.

"After considering all of the foregoing matters, you will assess such sum of money to the plaintiff as will fairly and reasonably compensate her for her injuries, if any, her pain and suffering, both physical and mental, past and future, if any, and the permanent effect of her injuries upon the plaintiff, if you find that plaintiff has permanent injuries."

Upon the ground and for the reason that appellant was entitled to have the Court instruct the jury that under Standard Mortality Tables, appellant had a life expectancy of 33.44 years, her life expectancy, however, being a question of fact for the jury's determination, and to be considered in assessing plaintiff's damages (Tr. 6).

VI.

The trial Court erred in its instructions to the jury in making the following statement:

"Mrs. Walker contends that she has been, and there is evidence that she suffered injury to her coccyx and injury to her low back which at least

one physician says is permanent, at least, there is a dispute on that point so you can consider whether or not she has suffered permanent injury to her back and to her coccyx." (Tr. 265.)

Upon the ground and for the reason that said instruction is a comment upon the evidence without being so described, as the jury was advised would be done (Tr. 257). It is an abstract and misleading instruction in that it is improperly worded and tends to confuse the jury.

VII.

The trial Court erred in its instructions to the jury in making the following statement (Tr. 269):

"The greater a person's interest in the case, the stronger is the temptation to false testimony, and the interest of the plaintiff is of a character possessed by no other witness.

"Manifestly, she has a vital interest in the outcome of the case. This interest is one of the matters you may consider along with other attendant circumstances in determining the credence you will give to her testimony."

Upon the ground and for the reason that said instruction is a comment upon the evidence without having been so described as the jury was advised could be done (Tr. 257); and upon the ground and for the reason that it is unfair comment without basis in law or fact in this case and indicates bias against the appellant, thereby tending to mislead and prejudice the jury against the appellant; and upon the ground and for the reason that said comment was an invasion of the province of the jury since the jury is the sole judge of the credibility of the witnesses (Tr. 258).

VIII.

Error prejudicial to plaintiff, appellant, occurred by misconduct of the jury in failing and neglecting to award plaintiff an adequate sum for plaintiff's injuries and damages as shown by the evidence in the case (Tr. 9B), upon the ground and for the reason that the sum awarded is unconscionably inadequate, considering the nature and extent of the injuries received by appellant, and the period of confinement caused by said injuries, and the permanency of said injuries.

IX.

The trial Court erred in failing and refusing to grant plaintiff's motion for a new trial (Tr. 14), upon the ground and for the reason that the trial Court committed prejudicial errors during the trial of this case, as set forth in the seven assignments of error above described, which deprived appellant of a fair trial, and misconduct of the jury deprived plaintiff of adequate compensation for her injuries.

SUMMARY OF ARGUMENT

Trial Court erred in restricting appellant's opening statement, without objection from opposing counsel; and in making undue comments, relative to appellant's opening statement, in the presence of the jury.

II.

Appellant contends that evidence of unusual physical and mental pain and suffering in giving birth to a child and the necessity of shortening the gestation period, as a

result of plaintiff's injuries, should have been admitted as being within the scope of the pre-trial order.

III.

Trial Court erred in permitting appellee's medical expert to relate a medical history to the jury, when said expert had not treated appellant, but had merely examined her for purpose of qualification.

IV.

Trial Court erred in failing to instruct the jury as to appellant's life expectancy, as found in the Standard American Mortality Tables.

V.

Trial Court erred in commenting upon the evidence and the credibility of the witnesses, without so advising the jury, after having promised the jury that the jury would be advised as to which statements constituted comment.

VI.

The jury was guilty of misconduct in assessing appellant's damages.

VII.

Trial Court erred in failing and refusing to grant plaintiff a new trial of the within cause.

VIII.

Appellant is entitled to have this cause again presented to the jury, and is entitled to have the jury fully advised as to the nature, extent and effect of her injuries and her physical and mental pain and suffering.

ARGUMENT

The pre-trial order (Tr. 3) provided:

> "as a proximate result of the negligence of the defendants and each of them, plaintiff was forced off the road to avoid a head-on collision with the motor truck and caused this plaintiff severe personal injuries, among which were numerous bruises and contusions to the plaintiff's body, severe brain concussion and brain damage, severe physical and mental shock and physical and mental pain and suffering, a severe tearing, twisting and wrenching of the tendons, muscles, ligaments, bones, nerves and soft tissue of her neck, back, pelvic area, right hip and leg, injuries to her upper chest, and aggravation of pre-existing arrested tuberculosis, from all of which plaintiff was rendered sick, sore, nervous and distressed, that plaintiff has permanent injuries to her head, neck, back, right hip and leg, and the internal organs of her chest, and will be permanently afflicted with the results of aggravation and dissemination of said tuberculosis, and has been damaged in the sum of $75,000.00, general damages." (Tr. 5.)

During the pendency of this case, defendants had available to them all of the discovery procedures available under the Federal Civil Rules of Procedure, and during that time, defendants did utilize discovery procedure in various ways, including: (1) Deposition taken of plaintiff by defendants (Tr. 61); (2) Physical examination of plaintiff by an orthopedic surgeon selected by defendants (Tr. 141).

In July 1954, more than six months prior to the trial of this cause, defendants were notified that plaintiff was pregnant (Tr. 282), and defendants were aware that the

injuries complained of were received on May 3, 1953 (Tr. 3).

During the course of plaintiff's opening statement, plaintiff sought to explain in what manner plaintiff's injuries affected her giving birth to the child with which she became pregnant after May 3, 1953 (Tr. 32). Without objection on the part of defendants, the court stated:

> "Mr. Peterson, this is the second or third time that you have gone beyond the pre-trial order. There is nothing in the pre-trial order about spina bifida occulta aggravation, and now you are telling us about conditions with reference to the birth of a child. These are not in the pre-trial order. You have had plenty of opportunities to do it. You are not an inexperienced lawyer. I do not think that this should be done."

to which plaintiff answered,

> "Your Honor, in respect to the spina bifida occulta, as I understand it, the testimony of the doctor will be there is no aggravation of it, and in respect to the childbirth, counsel is aware of that. He has had her examined recently, and I believe it proper under the charge of pain and suffering." Tr. 33.)

and the court replied:

> "Do not do it any more." (Tr. 33.)

Upon the completion of the testimony of Dr. John F. Abele, plaintiff inquired whether he might make an offer of proof during the recess in the absence of the doctor, and the court granted this request (Tr. 113), whereupon the doctor was excused from further attendance of the trial (Tr. 112), and during the next recess plaintiff made the following offer of proof (Tr. 130):

"Mr. Peterson: If Dr. Abele had been asked the questions as to the low back injury including both the coccyx and the lumbosacral sprain in relation to pregnancy, he would have testified that Mrs. Walker spent the greater part of her pregnancy in bed because of the danger of miscarriage because of an induced birth, lumbosacral strain, and the coccyx injury displacement. The doctor would further have testified, if permitted, that because of the displacement of the coccyx delivery was prolonged and painful; that it might not otherwise have been true, and also that they stimulated Mrs. Walker in order to induce childbirth early, approximately at six months, in order to avoid excessive pain and suffering to her during the childbirth at normal period and in order to promote the chance of the child living because of the condition of her spine.

The Court: You said at six months.

Mr. Peterson: Seven and a half months, your Honor, seven and a half months.

The Court: I think you had better get the doctor back here. I do not think he is going to testify to that, and I do not want anything in the record as an offer of proof unless I believe that the doctor will so testify so if you want to make an offer of proof bring the doctor back at any time, and I am going to ask questions. I am going to reject it any way for the reason that the pre-trial order does not disclose any of these contentions. Mr. Peterson, you are not an inexperienced lawyer in this court, and you know the rules here, and the rules require specificity with reference to the type of injuries or nature of injuries which the plaintiff sustained; therefore, I will not permit this evidence to be introduced. I made an exception on the part of Dr. Selling although we do have a rule here that when new evidence is brought in which the other party had no opportunity to anticipate, he is entitled to postponement of the trial in order to try to meet that evidence. I did not do that as far as Dr. Selling is concerned, but this type of evidence would, in my

opinion, require me to permit a re-examination of the plaintiff and to give them an opportunity to attempt to meet it. I will take the doctor's testimony at nine-thirty tomorrow morning." (Tr. 130.)

Plaintiff was asked the following question on direct examination:

"Q. Mrs. Walker, have you had a child since May 3, 1953?

A. Yes, I have.

Q. Did you have any difficulty during the pregnancy . . . ?" (Tr. 68.)

A general objection was made, which was sustained, whereupon an offer of proof was made as follows (Tr. 253):

"Q. Mrs. Walker, when did you give birth to the child, your last born child?

A. October 19, 1954.

Q. Was the child earlier than the nine month period of gestation?

A. Yes.

Q. What period of gestation was there?

A. About seven and a half months.

Q. Who was the doctor at that time?

A. Dr. George Lage.

Q. Is he an obstetrician?

A. Yes.

Q. Was there any inducement for earlier premature childbirth?

A. Yes.

Q. Did you have any difficulty with your back or right hip or coccyx during pregnancy?

A. Definitely, yes.

Q. Do you know the reason or relationship of the pregnancy with your difficulty with your back and coccyx and right hip?

A. Yes.

Q. What is the relationship?

Mr. Gearin: We object on the grounds of competency.

The Court: She may answer.

The Witness: Well, as the baby got heavier and the pressure increased on the bone structure in that region it became very painful or sore.

Q. (By Mr. Peterson) Could you wear a back support for it?

A. I couldn't wear a back support because I could not have tightness over my tummy.

Q. Did any doctor prescribe a back support for you?

A. Dr. Abele told me to wear a tight girdle. That was before I was pregnant. I couldn't wear a girdle because of the pregnancy.

Mr. Peterson: No further questions."

which offer of proof was rejected (Tr. 255).

The question raised by the ruling of the court, as set forth above, is whether the pre-trial order was sufficiently broad to permit the introduction of evidence concerning the effect of plaintiff's injuries upon her ability to bear children; either, as a part of the injuries described in said pre-trial order; or, under the physical and mental pain and suffering described therein.

In U. S. v. Wagner Milk Products, Inc., 61 F. Supp. 635, it was held that the rules of civil procedure require only a short and plain statement of the claim, showing that the pleader is entitled to relief; a complaint must allege sufficient facts to fairly apprise the defendant of the nature and basis of the asserted claim and relief requested; ultimate facts and details of evidence are not required to be shown.

Rule 16 FCR of CP provides that the court may hold a pre-trial conference to consider the necessity or de-

sirability of amendment to the pleadings. In this case, a pre-trial conference was held, and defendant at that time had knowledge that plaintiff had been pregnant (Tr. 282), yet made no objection to the wording of the pre-trial order.

Concerning Rule 43 (A), of FCR of CP, it was stated in N. Y. Life Ins. Co. v. Seegham (CCA 6), 140 F. 2d 930,

> "The statute or rule which favors the reception of evidence governs."

In Wright v. Wilson (CCA 3), 154 F. 2d 616,

> "This is a rule of admissibility and not exclusion and the evidence comes in under whichever one of the tests of admissibility is most favored."

In U. S. v. Vehicular Parking, Ltd. (D.C. Del), 52 F. Supp. 751 (quoting 3 Moore, Fed. Prac, Sec. 43.01, p. 3063),

> "This rule revolutionizes federal evidence, and, in general, places admissibility upon the sole basis of relevancy and materiality."

Rule 43 (A) of FCR of CP provides

> ". . . All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States Court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made."

In National Battery Co. v. Levy (CCA 8), 126 F. 2d 33, the court held that the FCR of CP provide for

the widest admissibility possible under state or federal law, of relevant evidence.

The evidence sought to be introduced is relevant only if the pre-trial order is reasonably interpreted to include a claim for the injuries and physical and mental pain and suffering sought to be proven by the testimony of plaintiff and her doctors, which evidence was excluded; or, if the injuries and physical and mental pain and suffering sought to be proven are of such a nature that they can be said to usually or ordinarily result from the wrongful acts alleged or from the nature and kind of injuries described. Barron v. Duke (Ore. 1926), 250 Pac. 628; Sporable v. Thomas (Kan. 1934), 33 Pac. 2d 721; Foster v. Hudson (Calif. 1939), 92 P. 2d 959; Aune v. Ore. Trunk Railway (Ore. 1935), 51 P. 2d 663.

The pre-trial order (Tr. 5), alleged

> "severe physical and mental shock and physical and mental pain and suffering, a severe tearing, twisting and wrenching of the tendons, muscles, ligaments, bones, nerves and soft tissue of her . . . back, pelvic area, right hip . . . that plaintiff has permanent injuries to her . . . back, right hip and leg."

The offers of proof (Tr. 130, 252), made by plaintiff in substance were offers to prove that the pain and suffering, and the stimulation required to cause the untimely birth were caused and necessitated by the injuries resulting from defendant's negligence, and were not an unusual result thereof.

The case of Denver and Rio Grande Ry. Co. v. James Harris, 122 U.S. 597, held

> "One of the consequences of the wound received by the plaintiff at the hands of defendant's servant was the loss of the power to have off-spring—a loss resulting directly and proximately from the nature of of the wound. Evidence of this fact was therefore admissible, although the declaration does not in terms, specify such loss as one of the results of the wound." Citing Wade v. Leroy, 61 U.S. 20.

The court said the loss of power to bear children should be considered in assessing plaintiff's damage, so it would follow that an injury requiring the mother to remain in bed during pregnancy, in order to avoid miscarriage, and requiring that the period of gestation be shortened by one and one-half (1½) months, would be the proper subject of damage (Tr. 130, 253). 50 A.L.R. 1189; Hively v. Higgs, 253 P. 363; Westfall v. Kern (Colo. 1935), 43 P. 2d 392.

It is true that the offer of proof as to the medical testimony (Tr. 130), was not made strictly in accordance with the provisions in FCR of CP 43 (C), but in this case the court and defendant agreed that the offer of proof could be made in the absence of the doctor (Tr. 112), and when the court was advised of the substance of the offer, the court stated that in any event the evidence would not be admissible (Tr. 113). Meany v. U. S. (CCA 2), F. 2d 538 (cited in 130 A.L.R. 973), held that the making of a formal offer of proof was not an absolute condition of alleging error in the exclusion of evidence. The record shows the significance of the exclud-

ed evidence to be obvious, and the court was fully apprised of plaintiff's position (Tr. 130, 253).

Plaintiff was a female of the age of 34 years (Tr. 39), and had given birth to a child (Tr. 138), and as such her reproductive ability at the time of this accident was as much a part of her as her ability to see. It was a physical function which she had a right to rely upon and in fact did rely upon and utilize (Tr. 68), and defendants admit knowledge of her pregnancy, after the date of her injuries and prior to the trial (Tr. 282). The pre-trial order (Tr. 5) alleged injuries to muscles, ligaments, bones, nerves and soft tissues of her pelvic area. It is certainly of common knowledge that the area described is, anatomically speaking, the portion of the body utilized in conceiving, bearing and giving birth to offsprings.

Gray's textbook of medicine, Vol. 1, Ch. 8, P. 173, Sec. 804,

> "The true pelvic area is that portion below the abdomen, incased in bone, muscle, and fascial structures, serving to protect the rectum behind, the bladder in front, the uterus and vagina between . . . The diameters of the brim are of cardinal importance since contraction through errors in development or limitation through distortion following fracture, may lead to disaster preventing the passage of the fetal head during labor."

Sec. 8.05 states:

> ". . . The two halves of the pelvis are attached by flexible cartilage, permitting motion only through stretching of this structure, particularly of importance during child delivery."

The plaintiff recognizes that the purpose of the pleadings and pre-trial order is to advise the opponent of the issues involved in the case, so as to afford an opportunity to prepare and properly present to the court and jury all of the facts necessary to a complete determination of the rights of all parties involved; but plaintiff contends that the pleadings, pre-trial order, deposition, physical examination and other discovery procedure available to defendants were sufficient to apprise defendants of the claim for injuries sought to be proven, and the surprise, if any, was on the part of plaintiff in not being permitted to introduce evidence of these injuries. Plaintiff alleged injuries to this portion of the anatomy and should have been permitted to establish the effect the the injuries alleged would have upon the usefulness of the organs, tissues, muscles, and other structures that have been specified as injured (Tr. 5).

Moe v. Alsop (Ore. 1950), 216 P. 2d 686 at 690, which was a personal injury action in which plaintiff alleged "crushed and permanently damaged plaintiff's chest and the organs thereof and his abdomen and the organs thereof", defendant sought to have the complaint made more definite and certain, and the court denied this motion on the ground that defendant had a right to have plaintiff examined and if defendant needed further information to enable him to prepare a defense, the information would be obtained by such examination, and the court said,

> "the ends of justice do not require plaintiff to set forth, in answer to a demand for a bill of particulars, a minute description of the physical injuries

> suffered . . . In many instances the plaintiff would not be able minutely and technically to describe his injuries."

In Green v. McGaughly (D.C.T., SD., 1940), 1 Fed R. Dec. 604, the complaint stated "and he was otherwise injured." The court held this allegation was not subject to motion to strike or make definite and certain, for if defendant needed further information, he could obtain it by use of discovery procedure. In support of this position, plaintiff cites: Braden v. Callaway, 4 FRD 147 at 148; Randolph v. McCoy, 29 F. Supp. 978 at 979, and Clyde v. Broderick (CCA 10, 1944), 144 F. 2d 348, where the court said:

> ". . . It should be observed that the pleader is not required to do more than make a 'short and plain statement of the facts upon which he relies to establish his claim. Garbutt v. Blanding Mines, 141 F. 2d 679; Pliner v. Nesvig 42 F. Supp. 297; C. F. Mumm v. Jacob E. Decker & Sons, 301 U.S. 168. More than that constitutes a breach of the rules of simplicity, conciseness and directness, which is the spirit of modern pleading . . . All doubts and ambiguities concerning the meaning and intendment of the pleader's language must be resolved in favor of the claim attempted to be stated, and if the language employed to state the claim is not sufficiently definite and particular to enable the adversary to prepare his responsive pleading or to prepare for trial the remedy is a motion for a more definite statement or a bill of particulars under Rule 12 (E) of the FCR of CP."

In Burton v. Weyerhauser Timber Co., 1 FRD 571, which was a case tried in the same court as this case, the court stated,

> "The prime objective of the new rules of civil procedure is to eliminate surprise as a trial tactic, one can hardly imagine a greater breach of the spirit of the new rules than to deny an injured man the right to show by the doctor attending him the fullest circumstances of his case."

In Brooklyn Heights Ry. Co. v. Mac Laury, 107 F. 644, the court said,

> "Injury to eyesight may be proved under a complaint alleging that plaintiff was hurled forward with such force as to bruise her knee, wrench her arm, and otherwise seriously and grievously injured her."

In Safeway Cab Service Co. v. Minor, 70 P. 2d 76, the court said, "considering our liberal system of pleadand procedure in view of plaintiff's sex and the nature of the accident", no error was committed in permitting the introduction of evidence of disturbance of the menstrual function of plaintiff, where such injury was not specifically pleaded.

In the case of Samuels v. Calif. St. Cable Co., (Calif. 1899), 56 Pac. 1115, there were no allegations of specific injuries, but evidence was introduced of urinary trouble, the court said, "Such evidence was admissible under the general averment of bodily injury and resulting damage", and cited Denver Ry. v. Harris, 122 U.S. 597. Jordan v. Great Western Motorways (Calif. 1931), 2 P. 2d 786.

It is plaintiff's position, based on the foregoing, that, as expressed in 68 A.L.R. 481-500, the court was confronted with conflicting consideration: (1) That plain-

tiff be allowed to recover all that she is fairly and justly entitled to, under a fair and just interpretation of her pleading: and, (2) That defendant be given a fair chance to know in advance the elements of plaintiff's claim, so as to enable him to prepare his defense accordingly and not be taken by surprise at the trial.

It has been our purpose to show that in this instance defendants had no legal basis for a claim of surprise (Tr. 131) in connection with the introduction of this evidence. In the first place, it is our contention that the pre-trial order (Tr. 5), itself, contained express notice of this injury, secondly, that defendants had available the discovery procedure for ascertaining the extent of plaintiff's injuries, and that if defendants failed to exercise that procedure, though we believe the procedure was exercised, this plaintiff should not be denied a right to fully disclose her injuries and the significance thereof, because the defendants might have been lax in the preparation of their defense.

Plaintiff's next contention is that the court erred, and plaintiff was prejudiced thereby, in its ruling regarding the testimony of Orville Noble Jones, a medical expert testifying on behalf of defendants.

Dr. Jones was called by defendants, out of turn, during plaintiff's case in chief, by stipulation of counsel and with the approval of the court (Tr. 140).

Dr. Jones was duly qualified and was asked on direct examination, by defendants, the following questions (Tr. 141):

"Q. Dr. Jones did you at my request conduct a physical examination of Mrs. Dorothy S. Walker?

A. Yes, sir, I did.

Q. Did you during the course of your examination cause X-ray photographs to be made of this lady's person?

A. Yes.

Q. Will you relate to the jury what this lady told you with reference to how she got hurt?

A. Yes."

at which time plaintiff entered an objection, "on the ground that it is not a history relating to the witness as a treating doctor" (Tr. 142); to which the court answered: "This is an adverse witness, Mr. Peterson. The objection is overruled." The witness then testified in substance as follows (Tr. 142): that her car rolled down a 60-foot embankment; that she attracted the attention of passersby; that she carried out limited physical activity due to her tuberculosis. She admits freely a prior accident about one and a half years before this accident, at which time there was a fractured rib on the left side (Tr. 144).

That the statements referred to as a part of the history are contrary to plaintiff's testimony in that: plaintiff does not contend her vehicle rolled (Tr. 177); plaintiff contends the first man at the scene was attracted by the lights from her vehicle (Tr. 45); that the limitation on her activity is largely due to these injuries (Tr. 49); that she was under the impression she had a broken rib, but discovered she had not (Tr. 56).

Plaintiff feels she has been prejudiced by the foregoing testimony in that the credibility of her testimony

was thereby attacked, and that the statements were made for the purpose of impeachment, without a proper foundation for that purpose having been layed.

In support of the contention that the objection should have been sustained, plaintiff cites the case of Atlantic Coast Line R. Co. v. Dixon (CCA 5, 1953), 207 F. 2d 899.

> "The rule in Georgia and generally in the Federal Courts is that a physician's testimony as to statements of pain and suffering made by a patient to a physician not for the purpose of treatment but to qualify the physician to testify as an expert witness are generally inadmissible."

Citing 67 A.L.R. 34, 80 A.L.R. 1530 and 130 A.L.R. 987, and the rule in Oregon as contained in the case of Reid v. Yellow Cab Co., (Ore. 1929), 279 Pac. 635, cited in 67 A.L.R. 1,

> "A physician consulted by plaintiff in an action for personal injuries, for the purpose of qualifying him to testify, may not, in testifying, repeat what the plaintiff told him as to how the accident occurred, or as to past suffering and nervousness."

Plaintiff next contends the court erred in failing to instruct the jury, as request by plaintiff in writing,

> "You are instructed that under the Standard Mortality Tables, a person of the age of thirty-five years has a life expectancy of 33.44 years. However, plaintiff's life expectancy is a question of fact for you to determine, taking into consideration plaintiff's age, sex, health, habits and nature of her occupation, whether hazardous or not." (Tr. 11.)

Plaintiff was prejudiced by the court's failure to give that instruction, for the reason that, as stated in Frangos

v. Edmunds (Ore. 1946), 173 P. 2d 596, where there is substantial evidence of permanent injury the Standard Mortality Tables may become admissible. The case holding that life expectancy is not determined alone by the Standard Mortality Table, but the life expectancy based thereon is evidence to be considered, together with "all other relevant testimony such as age, sex, health, habits, physical condition of the plaintiff, and the nature of his employment, whether hazardous or not."

Plaintiff contends the court committed prejudicial error in its charge to the jury, in that the court advised the jury that the court would advise the jury as to what portions of the charge constituted comment (Tr. 257). Plaintiff makes no claim that the court has not the right to comment upon the evidence, but plaintiff contends the jury was misled by the court into believing that unless the court specified its charge as comment, that the charge would be a matter of law, and the jury would be bound thereby in reaching its decision upon the facts and the law.

In its charge to the jury, the court stated "a judge of the Federal Court has the privilege of commenting on the evidence. If I do so in this case I shall tell you what portion of my instructions constitute comment" (Tr. 257).

Plaintiff contends the following excerpts from the court's instruction constituted comment, and the court failed in each instance to tell the jury that said excerpts were comment:

"Mrs. Walker contends that she has been, and there is evidence that she suffered injury to her coccyx and injury to her low back which at least one physician says is permanent, at least, there is a dispute on that point so you can consider whether or not she has suffered permanent injury to her back and to her coccyx. (Tr. 265.)

"The greater a person's interest in the case, the stronger is the temptation to false testimony, and the interest of the plaintiff is of a character possessed by no other witness.

"Manifestly, she has a vital interest in the outcome of the case. This interest is one of the matters you may consider along with other attendant circumstances in determining the credence you will give to her testimony" (Tr. 269).

As to the comment regarding testimony of permanency (Tr. 265), plaintiff further contends it is abstract and misleading, in that it is improperly worded, and tends to confuse the jury.

As to the comment concerning plaintiff's interest (Tr. 269), plaintiff contends it was biased, partial and inequitable, upon the ground and for the reason that defendants were equally interested in the outcome of the litigation; that the jury could recognize the bias indicated therein and be mislead thereby. Plaintiff further contends that the instruction was more than a comment upon the evidence, but was, in truth and in fact, an invasion of the province of the jury, in that the jury is the sole and exclusive judge of the credibility of all witnesses, including the litigants, who participate as witnesses. 53 Am. Jur. 80 Trial, Sec. 82.

Plaintiff contends the jury was guilty of misconduct in awarding plaintiff the sum of only $1500, for the reason that, as the court instructed (Tr. 266),

> ". . . Therefore if you find for the plaintiff, you may allow her the sum of $956.13 for medical and hospital expenses, and that is in addition to the amount you allow her for general damages."

As to the allowance of general damages, the following was to be considered by the jury: Plaintiff was a female, 34 years of age, who has suffered from tuberculosis, that at the time of her injuries was arrested (Tr. 39), that as a result of the accident, she lost consciousness (Tr. 44), coughed blood (Tr. 47), crawled an embankment (Tr. 44), had headaches and muscle spasms (Tr. 47), was a hospital patient in traction for a period of two and a half weeks (Tr. 48), had suffered spells of dizziness and fainting for a period of nearly two years (Tr. 49), was a patient in a tuberculosis hospital for seven weeks (Tr. 50), has a sprained neck and low back (Tr. 89), a displaced coccyx (Tr. 95), would probably require fusion of the back and removal of the coccyx (Tr. 98), which would require hospitalization for six weeks and wearing of a cast for three months (Tr. 99), would have pain for the remainder of her life (Tr. 102), that she had temporary brain damage (Tr. 122), a concussion, post traumatic headache and dizzy spells, numbness and uncoordination of arms (Tr. 119), and that she had a bleeding lung (Tr. 136).

It is the position of plaintiff that the jury failed to follow the instruction of the court concerning damages (Tr. 266), and that there has been an evident failure of

justice to the plaintiff in this regard, which reasons have been recognized as a basis for the setting aside of the verdict and the granting of a new trial, 15 Am. Jur. 664, Damages, Sec. 231.

In finding for plaintiff the jury was obligated to award plaintiff, in addition to the plaintiff's special damages of $956.13, a reasonable sum to compensate her for her injuries, temporary and permanent, physical and mental (Tr. 266). Generally, those injuries have been described above, and it is apparent that the sum of less than $550.00, is grossly inadequate for the injuries described; however, in addition to this, plaintiff contends, as argued herein, that the court should have permitted the introduction of evidence concerning the physical and mental pain and anguish surrounding the birth of her child, as well as the necessity of falsely stimulating the birth of that child after only seven and a half months of pregnancy (Tr. 253).

Plaintiff contends, for the reasons stated: that the jury failed to award a reasonable sum for the injuries which were shown by the evidence; and that the court refused to permit plaintiff to prove all of her injuries, that the verdict should be set aside, and a new trial should be granted.

In the case fo Kaufman v. Atlantic Greyhound Corp. (DC W. Va.), 41 F. Supp. 252, it was held that a motion to set aside the verdict and for a new trial should be granted to prevent a miscarriage of justice. And though it is conceded by plaintiff that the granting of a motion for new trial is largely a matter of discretion with the

trial court, the refusal of the trial court can properly be assigned as error on appeal from a final judgment subsequently entered, Marshalls U. S. Auto Supply, Inc. v. Cashman (CCA 10), 111 F. 2d 140.

In the instant case, plaintiff recovered the sum of $1500.00, in a judgment filed February 28, 1955 (Tr. 9A), and filed a motion for a new trial on March 7, 1955 (Tr. 14), assigning as error the failure of the court to permit plaintiff to introduce evidence of all of her injuries, the court's refusal of plaintiff's offer of proof of said injuries, the court's failure to instruct the jury as to plaintiff's life expectancy, as found in the Standard American Mortality Tables, the jury's misconduct in failing to follow the court's instructions as to damages, and the inadequacy of the verdict (Tr. 10).

Said motion was argued and on March 21, 1955, the same was denied (Tr. 14).

Plaintiff contends the court could well have denied said motion on any one of the errors assigned, but in considering all of the errors together, it is apparent that there has been a manifest miscarriage of justice for the reason that in finding for plaintiff it was necessary that the jury find the defendant guilty of negligence, as charged, and that defendant's negligence was the proximate cause of plaintiff's injuries, which were shown by plaintiff to be severe and permanent and have been fully described herein.

Plaintiff has argued the court's error in refusing to permit her to establish the full nature and extent of injuries received, and the effect thereof upon her repro-

ductive system, and she seeks a new trial, for the purpose of permitting her to present to the court and jury all of the material facts, within the issues of the pre-trial order, as set forth at the commencement of her argument of this case.

We submit the judgment should be set aside and a new trial of this cause ordered.

Respectfully submitted,

PETERSON & POZZI and
BURTON J. FALLGREN,

By NELS PETERSON and
BURTON J. FALLGREN,
of Attorneys for Appellant.